

1

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

LIONS ASSOCIATES, LLC	)	
	)	
Plaintiff,	)	Civil No. 10-189
	)	
VS.	)	May 13, 2010
	)	
SWIFTSHIPS SHIPBUILDERS, LLC	)	
	)	
Defendant.	)	
_____	)	

REPORTER'S TRANSCRIPT

MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: VENABLE LLP  
BY: J. DOUGLAS BALDRIDGE, ESQ.  
LAUREN D. EADE, ESQ.

FOR THE DEFENDANT: THE NUBANI LAW FIRM  
BY: ASHRAF NUBANI, ESQ.  
FAISAL GILL, ESQ.  
THE HMA LAW FIRM  
BY: HASSAN M. AHMAD, ESQ.

---

OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR, CRR  
U.S. District Court  
401 Courthouse Square  
Alexandria, VA 22314  
(703) 501-1580

RENECIA A. SMITH-WILSON, RMR, CRR

INDEX

ARGUMENT BY THE PLAINTIFF	13
ARGUMENT BY THE DEFENDANT	4, 20
RULING BY THE COURT	22

---

1 (Thereupon, the following was heard in open  
2 court at 11:19 a.m.)

3 THE CLERK: 1:10 civil 189, Lions Associate,  
4 LLC versus Swiftships Shipbuilders, LLC.

5 Would counsel please note your appearances  
6 for the record.

7 MR. BALDRIDGE: Good morning, Your Honor.  
8 Doug Baldrige from Venable on behalf of plaintiff.

9 With me today is Lauren Eade also from  
10 Venable and Admiral Lyons.

11 THE COURT: Good morning.

12 MR. NUBANI: Good morning, Judge Lee.  
13 Ashraf Nubani, local counsel for Swiftships --

14 THE COURT: Good morning, Mr. Nubani.

15 MR. NUBANI: -- Shipbuilders. I have with  
16 me, Hassan Ahmad who will be doing the argument and  
17 Faisal Gill from Swiftships.

18 THE COURT: Good morning.

19 I am ready when you are, counsel.

20 If you all would when you come to the podium  
21 announce your names for the court reporter that would be  
22 helpful. Thank you, sir.

23 MR. AHMAD: Good morning, Your Honor.  
24 Hassan Ahmad, A-H-M-A-D on behalf of -- pro hac vice  
25 counsel for Swiftships Shipbuilders, LLC.

1 THE COURT: Good morning.

2 MR. AHMAD: Why we're here. The issue here  
3 today, Your Honor, the plaintiff has to plead plausibly  
4 not just possibly but the plaintiff has to plead  
5 plausibly.

6 The relief sought in this case is not  
7 plausible when the contract is void on public policy  
8 grounds.

9 And it is a waste of judicial resources and  
10 of this Court's time to go through an entire, you know,  
11 discovery process and a protracted trial when this Court  
12 has all the information it needs to dispose of this case  
13 today.

14 Even if it does consider matters that are  
15 technically outside of the pleadings under Rule 12(d),  
16 this Court, as it is well aware, can treat this as a  
17 summary judgment motion and consider that -- and  
18 consider those materials.

19 And so we would ask the Court to consider  
20 Exhibit 6 to our second motion to dismiss which is page  
21 105 of the Iraqi Navy contract. It bars relief.

22 The plaintiff can produce no set of facts  
23 entitling it to relief because contingent fees are  
24 barred unless agreed to in advance by the government of  
25 Iraq. And the government of Iraq has not agreed to it.

1 Therefore contingent fees are completely barred.

2 Even if the government of Iraq had agreed to  
3 it, the statutory cap -- I'm sorry, the cap on the  
4 contingent fees would have been \$50,000.

5 So, of course, the next question is -- the  
6 next question is that the plaintiff is trying to say  
7 that it's not bound by the terms of the Iraq and Navy  
8 contract because that contract is between Swiftships and  
9 the United States government.

10 Unfortunately, that argument doesn't have  
11 any merit. Under the *Quinn* Court's ruling which was  
12 cited extensively in the briefs by the parties, it is  
13 against public policy to allow a third party agent to  
14 collect on a contract that is illegal and void on public  
15 policy grounds. Privity of contract is irrelevant.

16 But the real meat of the plaintiff's  
17 complaint here hinges on a plausibility analysis, and  
18 that's why --

19 THE COURT: And let's focus on that just for  
20 a second here.

21 MR. AHMAD: Sure.

22 THE COURT: The issue of contingency fee, if  
23 any and I've read the FAR regulation 48 CFR 52.203-5(a).  
24 Is that the clause that you say would bar contingent  
25 fees in a government contract like this one?

1 MR. AHMAD: That is one of the provisions of  
2 law, yes, Your Honor, that generally states as a matter  
3 of policy that contingent fees are against public policy  
4 unless certain narrow exceptions are met. And tying us  
5 into a whole plausibility issue which is, of course, why  
6 we're here on a 12(b)(6) motion, we're not asking this  
7 Court, we're not asking Your Honor to engage in a  
8 full-fledge factual analysis. We understand, of course,  
9 that would be inappropriate at the 12(b)(6) stage.  
10 We're not asking you, Your Honor, to engage in a factual  
11 analysis even though the plaintiff keeps trying to say  
12 that's what we're doing.

13 In any 12(b)(6) analysis, as the Court is  
14 well aware, the Court has to make a determination on  
15 plausibility. And again, I repeat, plaintiff has to  
16 plead plausible.

17 THE COURT: And plausibility means a factual  
18 showing that the defendant may be liable to the  
19 plaintiff.

20 MR. AHMAD: Right. Is it likely based on  
21 the complaint that the plaintiff is entitled to relief.

22 THE COURT: It doesn't mean you -- it  
23 doesn't mean the plaintiff wins. It means the plaintiff  
24 has set forth sufficient facts to give the defendant  
25 notice of the assertion of the common law statutory

1 claim. Is that right?

2 MR. AHMAD: I believe so, Your Honor. I  
3 think there's a distinction between possible in which  
4 case I guess if you had to assign sort of a numerical  
5 score to it, even a possible score might be even one  
6 percent that the plaintiff is entitled to relief.

7 But it's not quite as high as probably which  
8 would be, I guess, 51 percent. It's probable somewhere  
9 in between. It has to be plausible, that we have to  
10 understand exactly what the notice of the -- of the  
11 issues are.

12 THE COURT: So, as I understand your  
13 argument it is basically, Judge, you have the contract  
14 between Lions and Swiftships and all you need to do is  
15 read that contract and you'll see built in a contingency  
16 clause which is barred by the FAR and the Iraqi  
17 contract. That it?

18 MR. AHMAD: That's part of it, Your Honor,  
19 but the complaint itself -- if I may just -- just a  
20 couple of other points I wanted to bring to the Court's  
21 attention.

22 The complaint itself clearly brings up  
23 contingent fees in the government contract. There's a  
24 government contract that's pled to, the Iraqi Navy  
25 contract or Tier contract actually, and there is this

1 three percentage clause that says that the plaintiff is  
2 entitled to three percent of the relief.

3 So clearly the complaint itself brings up  
4 the issue of contingent fees in the government contract.  
5 The briefs -- we're to inform the Court about contingent  
6 fees in government contracts and the public policy  
7 concerns, and we would argue especially here in the  
8 Fourth Circuit.

9 In a sort of normal or run-of-the-mill  
10 breach of contract action, it might be sufficient for  
11 the plaintiff to plead what it did or an unjust  
12 enrichment action. But in this case, what we're asking  
13 the Court to do is to take judicial notice that  
14 contingent fees are generally against public policy  
15 unless certain exceptions are met.

16 THE COURT: Well, let's say I agree with  
17 that. Let's say I agree with that. That is the law.

18 MR. AHMAD: Sure.

19 THE COURT: Now the FAR does say except a  
20 bona fide employer or agency. Is it your view I can  
21 make that judgment by just looking at the complaint and  
22 the contract?

23 MR. AHMAD: Yes, Your Honor, because if the  
24 plaintiff must plead plausibly, not possibly, but  
25 plausibly. Then the complaint doesn't make any mention



1 of the factors of the plaintiff being a bona fide agent.  
2 It doesn't say anything about how well he understands,  
3 for example, the business of the defendants, Swiftships.  
4 It doesn't say how to perform the contract. It doesn't  
5 say what he even did in general terms to bring quote  
6 unquote "bring" the Iraqi Navy contract to the  
7 defendant, Swiftships.

8 So given these gaping holes, given these  
9 deficiencies in pleading, I would ask this Court to ask  
10 itself this question. How is a complaint like that  
11 plausible? How it is plausible when the general rule is  
12 that contingent fees in government contracts are void as  
13 a matter of public policy.

14 THE COURT: I want to ask you another  
15 question.

16 MR. AHMAD: Sure.

17 THE COURT: And you all heard me ask this  
18 question early so you knew it was coming.

19 And we all had civil procedure. And I tell  
20 pro se plaintiffs all the time that lawyers spend a  
21 whole year in law school studying how to bring a case in  
22 the federal court. So it's not an easy matter to  
23 undertake.

24 I realize that *Ashcroft versus Iqbal* has  
25 been viewed by the commentators and the courts as a sea

1 change in the requirements of pleading.

2 My question to you is whether in a breach of  
3 contract case, and that's all this is to me, a plaintiff  
4 is required to set forth in detail every single  
5 statement, every single witness statement, every single  
6 theory concerning liability and to set forth in great  
7 detail the bona fides of agency with respect to the  
8 exception.

9 MR. AHMAD: Your Honor, the answer -- our  
10 position of course is no. You don't need to have a 200  
11 or 300 or 400 paragraph complaint that states in detail,  
12 anticipates every single potential defense. No, that's  
13 not necessary.

14 What I'm asking this Court to do is to ask  
15 its -- is to make a judgment call and realize that --  
16 let me put it this way, Your Honor. Would this Court  
17 allow a plaintiff to sue the United States government  
18 without a showing that that plaintiff adhered to the  
19 Federal Tort Claims Act? Or would this Court allow a  
20 plaintiff to sue for defamation without showing it was  
21 prima facie eligible under the Communications Decency  
22 Act of 1996? Or for that matter, would this Court allow  
23 a plaintiff to sue an employer for violation of the  
24 Family Medical Leave Act without pleading that he was an  
25 eligible employee?

1 All of these cases, the Court would be  
2 entitled to consider the fact that there are certain --  
3 for each individual case and in this case, it's not just  
4 a regular breach of contract case because there is an  
5 overarching, very strong, very well documented public  
6 policy that says that contingent fees in government  
7 contracts are void as a matter of public policy.

8 THE COURT: Well, gaming contracts are void.  
9 There are many types of contract -- contract to commit  
10 murder is against public policy.

11 So your view is that in order to state a  
12 claim for breach of contract, a plaintiff must set forth  
13 that their claim for breach of contract involves a  
14 lawful activity and they must plead that the  
15 illegalities I just referred to, gaming, contract for  
16 murder, contract to sell a child, that that is not a  
17 part of the contract?

18 MR. AHMAD: Well, if it becomes an issue.  
19 If it --

20 THE COURT: Well when does it become -- it  
21 doesn't become an issue until the defendant respond; is  
22 that right?

23 MR. AHMAD: No, it becomes an issue when the  
24 plaintiff pleads. Again, it's the plaintiff that is  
25 bringing up the issue of contingent fees in a government

1 contract.

2           The four corners of the complaint allege  
3 that. And that's where it comes from. So if the  
4 plaintiff is going to bring up this issue of a  
5 contingent fee in a government contract and there is an  
6 overarching public policy -- overarching public policy  
7 against government fees in -- contingent fees in  
8 government contracts, then it behooves the plaintiff to  
9 plead that away.

10           I'm just saying in this --

11           THE COURT: Do you agree because you just  
12 stated a moment ago that there are five elements that  
13 the Court has to consider under the *Quinn* case if I  
14 agree that that Second Circuit case applies here or the  
15 *Puma* case that I'd have to determine about the bona  
16 fides of the agency. You agree that that is not a legal  
17 question. That is a factual question, is it not?

18           MR. AHMAD: I agree that that would be a  
19 factual question, but that's not what we're asking this  
20 Court to do.

21           THE COURT: No, you're saying that they have  
22 to plead those five elements in order to state a claim.

23           MR. AHMAD: They have to plead something.  
24 It has to be a plausible form of relief. Again we're  
25 not trying to say that the plaintiff has to put on its

1 entire case and to plead every single last element and  
2 anticipate every single last defense, no.

3 But where there is an overarching public  
4 policy -- where there is an overarching public policy in  
5 which the only way the plaintiff can actually gain any  
6 sort of relief or be awarded any sort of relief is to  
7 show that he is a bona fide agent, no, he doesn't have  
8 to prove in the complaint that he is bona fide agency.  
9 But he at least has to put in something, something in  
10 the complaint, something in the declarations afterward  
11 to allow this Court to say, well, you know, it's  
12 possible that he is.

13 THE COURT: All right.

14 MR. AHMAD: It's plausible that he is.

15 THE COURT: I have asked you the questions  
16 that I have. What I'd like to do now is to hear from  
17 the other side and I'll give you a chance to respond.

18 MR. AHMAD: Thank you, Your Honor.

19 THE COURT: Thank you.

20 MR. BALDRIDGE: Thank you, Your Honor. For  
21 the reporter, Doug Baldridge, B-A-L-D-R-I-D-G-E on  
22 behalf of Lions.

23 Your Honor, if you just look at the *Enomoto*  
24 case by Judge Cacheris or the *Dodge* case by Judge  
25 Trenga, both post-*Twombly*, you see that we very easily

1 made all the allegations necessary to state a plausible  
2 claim for relief for breach of contract.

3 Now, what makes this case different is then  
4 we get to this bar on contingency fees --

5 THE COURT: Well, what do you have to allege  
6 to allege a claim for breach of contract?

7 MR. BALDRIDGE: Well, you allege the  
8 existence of a contract which I can point you to the  
9 allegations. You allege that that contract was breached  
10 which I can point you to the allegations in the  
11 complaint. You can -- you can allege that performance  
12 occurred on behalf of the plaintiff, which I can point  
13 you to the allegations of the complaint and you allege  
14 damages.

15 THE COURT: Causation and damages, right?

16 MR. BALDRIDGE: Causation and damages and  
17 it's all right there in the complaint and it's all very  
18 carefully outlined in our briefs, and I don't think  
19 there's any question that those have been met.

20 THE COURT: Well, help me with your response  
21 to plaintiff counsel's argument about plausibility.  
22 First tell me what you think plausibility means and then  
23 second tell me what facts are required to demonstrate  
24 plausibility.

25 MR. BALDRIDGE: Well, coming out of *Twombly*

1 and *Ashcroft*, we do have kind of a confused state of the  
2 law. It came out of a large antitrust case and there  
3 was a lot more to it than a simple breach of  
4 contract liability --

5 THE COURT: Well, *Bell Atlantic versus*  
6 *Twombly* was antitrust, but *Ashcroft versus Iqbal* was  
7 a --

8 MR. BALDRIDGE: Took it on to the next  
9 level. And I think you said it absolutely right in the  
10 prior hearing, Your Honor, that plausible meant facts  
11 sufficient to show that the defendant may be liable to  
12 the plaintiff.

13 There is no doubt that there are facts  
14 alleged in this complaint that show that this defendant  
15 may be liable to my client. We allege the contract. We  
16 attached the contract. We state that he was entitled to  
17 this three percent fee. We state that they failed to  
18 pay that fee. We state that Admiral Lyons on behalf of  
19 the entity fully performed in getting this company  
20 reclassified to Tier 1 and persuaded the government on  
21 the merits and capabilities, very key, said it right in  
22 the complaint, the merits and capabilities that  
23 Swiftships was the better choice for the United States  
24 government, and we allege damages in a set amount.

25 THE COURT: Are you required to demonstrate

1 the nonexistence of some deficiency like illegality?

2 Are you required to?

3 MR. BALDRIDGE: Of course not. You can't  
4 plead away every affirmative defense. And the way the  
5 CFR works here is as a general statement that contingent  
6 fees except under certain circumstances are not going to  
7 be enforced.

8 We claim and will claim that it will be  
9 pursued through discovery and probably by affirmative  
10 defense that our client is a bona fide commercial agent.

11 To decide whether our client is a bona fide  
12 commercial agent before you even get to the five  
13 factors, you got to ask yourself did he assert or  
14 improper influence to insure the award of this contract?

15 There is no possible way that we had to  
16 plead away improper influence in order to state a claim,  
17 and there's no possible way to decide through  
18 application of the five human factors or additional  
19 factors whether or not improper influence was exerted  
20 here on a motion to dismiss.

21 You've got to get to the facts to decide  
22 whether this company is a bona fide commercial agent and  
23 that's the issue here.

24 We don't have to plead that away. It's an  
25 affirmative defense. It's long established.



1 Do I have to plead in a patent case that my  
2 client didn't engage in inequitable conduct? No. But,  
3 inequitable conduct is a bar to a patent case. That's  
4 an affirmative defense that's raised. You have a  
5 response. You take discovery and you see what happens.

6 You don't plead away the murder contract as  
7 you said in the breach of contract action. These are  
8 all affirmative defenses.

9 THE COURT: Well, the agreement is before  
10 the Court and, in your view, you set forth the elements  
11 of a breach of contract claim. I'm trying to decide if  
12 there's more that is required because of *Ashcroft versus*  
13 *Iqbal* or *Bell Atlantic versus Twombly* to state a claim  
14 for breach of contract.

15 MR. BALDRIDGE: Let's take the *Enomoto* case  
16 with Judge Cacharis on this bench post-Twombly. Judge  
17 Cacharis said under *Twombly* a 12(b)(6) motion has to be  
18 denied even though the plaintiff in that case did not  
19 allege the terms, the existence or even attached the  
20 contract to the complaint in a breach of contract  
21 action. He said you've said enough just simply by  
22 saying here's the contract and here's how the other  
23 party breached it.

24 We've said how they breached it. They  
25 didn't pay us the money they owed us under the contract

1 attached to the complaint. It is -- it is -- *Ashcroft*  
2 and *Twombly* did not add a requirement that you plead  
3 away every possible obstacle to your case.

4 What they say and stand for the proposition  
5 if, Judge, you see facts and you say at this point  
6 looking at the four corners of the complaint, do I see  
7 enough facts to say this defendant may be liable to  
8 plaintiff? And if the answer to that is yes, you've got  
9 to deny the 12(b)(6). And --

10 THE COURT: What I have here is a seven page  
11 complaint with four pages of exhibit, so eleven page  
12 complaint for the breach of contract claim, not 50 pages  
13 with 300 paragraphs, not 60 pages with 500 paragraphs.

14 I think I've asked you the questions that I  
15 have.

16 MR. BALDRIDGE: I'll just comment that  
17 *Twombly* was probably had to be a 100 page complaint,  
18 antitrust --

19 THE COURT: But antitrust is a whole  
20 different ball game. It's kind of securities fraud.  
21 You can't come in here with a securities fraud case and  
22 say they defraud me. You've got to -- there's a whole  
23 standard concerning statutory claims which plaintiff's  
24 counsel brought up and that's a distinction I asked you  
25 to address whether when you're dealing with Federal Tort

1 Claims Act or even employment discrimination, there are  
2 certain statutory requirements that have to be pled in  
3 order to state a claim.

4 And is your claim here one that there are  
5 any prerequisites other than what you've pled?

6 MR. BALDRIDGE: I'm sorry. Are there --

7 THE COURT: Are there any other prerequisite  
8 pleading or statutory required to plead a claim for  
9 breach of contract like in Tort Claims Act you have to  
10 show you filed a claim within a certain number of days?

11 MR. BALDRIDGE: And there are not, Your  
12 Honor, and that's why the defendant cannot cite a single  
13 case deciding this on a 12(b)(6) basis, deciding the  
14 same issue because it doesn't occur on a 12(b)(6) basis.

15 If you take *Quinn*, for example, jury trial  
16 on the merits. If you take any of these other cases,  
17 the facts are flushed out as to whether somebody is a  
18 bona fide commercial agent and then the Court decides.  
19 You can't do it on 12(b)(6).

20 And furthermore as a general matter, I don't  
21 know how you can file 12(b)(6) with three declarations,  
22 the Iraqi Navy contract to which we're not a party  
23 asking the Court to consider one page of the 200 pages  
24 of that, a brief that repeatedly refers to the lack of  
25 proof in evidence. That's not what 12(b)(6) is about.

1 That's why there are no 12(b)(6) cases supporting their  
2 position.

3 THE COURT: Thank you very much.

4 MR. BALDRIDGE: Thank you.

5 THE COURT: Mr. Ahmad, I'll give you a  
6 chance to respond.

7 MR. AHMAD: Very briefly, Your Honor. Thank  
8 you.

9 THE COURT: Thank you.

10 MR. AHMAD: Very briefly, Your Honor, we're  
11 not saying that a plaintiff has to plead away all the  
12 possible defenses. We're just saying where there is an  
13 overarching as you mentioned statutory requirement in a  
14 particular breach of contract and it has to be on a  
15 case-by-case basis, where there is overarching public  
16 policy as we have here that the plaintiff has a slightly  
17 higher burden after *Ashcroft*, after *Bell Atlantic versus*  
18 *Twombly* to plead away and show -- he has to at least  
19 say -- he has to at least say that he's a bona fide  
20 agent.

21 He doesn't do that anywhere in the  
22 complaint, anywhere in his declarations. Nowhere does  
23 he say that he's a bona fide agent. And he needs that  
24 in order to show and in order to make any sort of  
25 plausible claim for relief.

1           Counsel referred to the cases of *Enomoto*  
2     *versus Space Adventures* and the CD -- *Dodge versus CDW*  
3     case. *Enomoto*, again, we had a 250-paragraph complaint.  
4     In *Dodge* it was also a very detailed amended complaint  
5     that stated exactly how the aggrieved plaintiff there  
6     who was a saleswoman was -- was supposed to perform  
7     under the contract to get the commission that she was  
8     trying to earn.

9           We're talking about plausibility. Bona fide  
10    agency has to be pleaded.

11           And the other issue that was brought up was  
12    the issue of improper influence. I just want to state  
13    also that improper influence is not something that  
14    has -- is required to be pled here. You can have an  
15    agency that is not bona fide that did not engage in  
16    improper influence.

17           In other words, an agency does not become  
18    not bona fide only because -- only because it engages in  
19    improper influence. Improper influence is something  
20    that will void a contingency fee, you know, across the  
21    board. It will be a permanent bar, you know, to that  
22    agency being considered bona fide, yes. But you can  
23    still have an agency that is not bona fide that did not,  
24    you know, engage in improper influence.

25           THE COURT: All right.

1 MR. AHMAD: And the very last thing I want  
2 to say, Your Honor, counsel said there was no case that  
3 was decided at the 12(b)(6) stage. I direct your  
4 attention to *Bradley*. It was 12(b)(6) and that's all I  
5 wanted to say, Your Honor.

6 THE COURT: Thank you. You're right,  
7 *Bradley* was decided on 12(b)(6).

8 Let the record reflect this matter is before  
9 the Court on the defendant's motion to dismiss the  
10 complaint under 12(b)(6). The parties have briefed the  
11 matter, and the issues presented are fairly narrowly  
12 focused.

13 First is whether the plaintiff sufficiently  
14 set forth the elements of a breach of contract claim  
15 where there is this contingency fee clause and whether  
16 the plaintiff has pled the elements of unjust enrichment  
17 under Count II. And the third I guess perhaps the most  
18 critical issue that we've spent most of our time  
19 discussing today is whether the agreement as set forth  
20 is void on public policy grounds because three percent  
21 clause is a contingency fee. I think everybody says  
22 that it is -- is prohibited under the Federal  
23 Acquisition Regulation that I've referred to during oral  
24 argument, and it's 48 CFR 52.203-5(a), 52.203-5(a) which  
25 does set forth a -- described as a covenant against

1 contingent fees and a warranty that the contractor makes  
2 that says, quote, "the contractor warrants that no  
3 person or agency has been employed or retained to  
4 solicit or obtain this contract upon an agreement or  
5 understanding for a contingent fee except a bona fide  
6 employer or agency".

7 I am persuaded that *Bell Atlantic versus*  
8 *Iqbal* -- *Bell Atlantic versus Twombly* and *Iqbal* have  
9 heightened the requirements that are necessary to set  
10 forth a claim generally.

11 I will not debate what is required. I can  
12 only make judgments individually in each case and look  
13 at the four corners of the complaint, accepting the  
14 factual assertions as true, disregarding the conclusions  
15 of law and ascertain whether the plaintiff has set forth  
16 a plausible claim which means that the plaintiff sets  
17 forth a claim that demonstrates the defendant may be  
18 liable to the plaintiff.

19 As it relates to the breach of contract and  
20 unjust enrichment claim, the Court is going to deny the  
21 motion because I'm of the opinion that the seven page  
22 complaint sufficiently sets forth a claim for breach of  
23 contract and for unjust enrichment.

24 As to whether or not the complaint  
25 sufficiently sets forth a claim that would traverse the

1 legal impediments to a contract that is contingent and  
2 prohibited by the FAR, it seems to me that we agree that  
3 the *Puma Industries*, that's P-U-M-A Industries  
4 Consulting case and the *Quinn*, Q-U-I-N-N case from the  
5 Second Circuit have set forth several factors the Court  
6 generally considers. And I don't see a Fourth Circuit  
7 case here that tells me what to consider, so I'm going  
8 to go with the Second Circuit standard. And I think  
9 plaintiff's counsel has directed to the five factors  
10 that must be evaluated which include, one, whether the  
11 fees are excessive compared to those typically allowed  
12 for similar services; second, whether the agency has  
13 adequate knowledge of the contractor's products or  
14 services; third, whether there has been continuity in a  
15 relationship between the agency and contractor; four,  
16 whether the agency is an established concern; and five,  
17 whether the arrangement is confined to only obtaining  
18 government contracts.

19 I am not going to make a judgment about  
20 these factors on a motion to dismiss because I think  
21 that they require a factual determination of the sum and  
22 substance of the claim that the plaintiff is a bona fide  
23 employer or agency.

24 I realize that there are cases that make  
25 this judgment, but they are typically done after a trial



1 or on summary judgment.

2 So, to be clear, I'm going to deny the  
3 motion to dismiss the complaint under 12(b)(6).

4 The arguments have been interesting. The  
5 briefs have been well written, and I thank you for your  
6 preparation.

7 MR. BALDRIDGE: Thank you, Your Honor.

8 MR. AHMAD: Thank you, Your Honor.

9 THE COURT: Thank you. We're in recess.

10 (Proceeding concluded at 11:47 a.m.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

## 1 CERTIFICATE OF REPORTER

2  
3 I, Renecia Wilson, an official court  
4 reporter for the United State District Court of  
5 Virginia, Alexandria Division, do hereby certify that I  
6 reported by machine shorthand, in my official capacity,  
7 the proceedings had upon the motions in the case of  
8 Lions Associates vs. Swiftships Shipbuilders.

9 I further certify that I was authorized and  
10 did report by stenotype the proceedings and evidence in  
11 said motions, and that the foregoing pages, numbered 1  
12 to 25, inclusive, constitute the official transcript of  
13 said proceedings as taken from my shorthand notes.

14 IN WITNESS WHEREOF, I have hereto  
15 subscribed my name this 13th day of May, 2010.

16  
17 /s/

18 Renecia Wilson, RMR, CRR  
19 Official Court Reporter  
20  
21  
22  
23  
24  
25

RENECIA A. SMITH-WILSON, RMR, CRR